In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 689

MANHATTAN-BRONX POSTAL UNION,

AND

THEODORE A. PETRE, PETITIONERS

v.

LAWRENCE F. O'BRIEN, POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is unreported. The opinion of the court of appeals (Pet. App. 15–25) is reported at 350 F. 2d 451.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1965. The petition for a writ of certiorari was filed on October 22, 1965. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

794—890—65

QUESTION PRESENTED

Whether the Postmaster General was acting within his powers under Executive Order 10988 in refusing to grant exclusive recognition to petitioner labor organization.

REGULATION INVOLVED

Executive Order 10988, 27 Fed. Reg. 551, is set forth at pages 27–33 of the petition.

STATEMENT

This action was brought against the Postmaster General to require him to deal with petitioner Manhattan-Bronx Postal Union[1] as the exclusive representative of postal employees in the New York City unit (R. 1, 15–16, 30–31). The union's claim was based upon Executive Order 10988, 27 Fed. Reg. 551, which established the procedure for recognizing organizations representing employees of federal government agencies (Pet. App. 27–33). Section 6(a) of the Order requires recognition of an eligible organization as exclusive representative of an employee unit if the organization "has been designated or selected by a majority of the employees of such unit".

Petitioner union received 66.6 percent of the votes cast by employees of the New York City unit in an election in which only 57.07 per cent of the eligible employees voted. Its total vote, therefore, represented only 38.1 per cent of the eligible voters (R. 28, 37, 38–40).

[1] The individual petitioner is a postal employee and a member of the union (Pet. App. 16).

The Postmaster General refused to recognize the union as exclusive representative on the ground that it did not satisfy the so-called "60% rule" (R. 38–40). This rule had first been recommended by a committee established under Section 13(b) of the Order to advise the President on its implementation. The committee recommended that exclusive representation be granted only if 60 per cent of the eligible voters cast ballots or if a majority of the eligible voters vote for one organization (R. 54). This recommendation, which was approved by the Civil Service Commission, was transmitted to all agencies. On May 25, 1962, nearly two years before the election here involved, the 60% rule was adopted by the Post Office and announced in a Postal Bulletin displayed on all employee bulletin boards (R. 50–51).

The district court dismissed petitioners' complaint. The court of appeals affirmed on the ground of sovereign immunity, and because the Order was not deemed to grant judicially enforceable rights.

ARGUMENT

1. The court of appeals properly held that sovereign immunity barred this suit because the relief requested would have required the Postmaster General to deal, on a continuing basis, with the petitioner union as the exclusive employee representative of the New York City unit. Hence it would interfere with the administration of a public program over an extended period of time. Petitioners contend, however, that the suit is not against the United States because the Postmaster General has acted beyond his delegated powers

by refusing petitioner recognition. See *Dugan* v. *Rank*, 372 U.S. 609, 621–622. Sovereign immunity applies, however, if the Postmaster General demonstrates that his reading of the Executive Order is a reasonable one; it need not be the only permissible reading of the Order. See *Udall* v. *Tallman*, 380 U.S. 1, 4. And, in this connection, the deference normally given to administrative interpretation of a statute is "even more clearly in order" when interpretation of an administrative order is involved. See *Udall* v. *Tallman*, 380 U.S. 1, 16.

2. The Postmaster General's reading of the Executive Order is clearly reasonable. Section 6(a) of the Order requires that the employee representative be "designated or selected by a majority of the employees of [the appropriate] unit". On its face, this language could mean either (1) that the majority of the unit must vote for the union, or (2) that a majority must cast ballots and only a majority of the voters is required for designation. It is true, as the court of appeals pointed out (350 F. 2d at 455, n. 7), that similar language in the Railway Labor Act and the National Labor Relations Act has been construed to require only that a majority cast ballots. *Virginian Ry.* v. *System Federation No. 40, etc.*, 300 U.S. 515; *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. 2d 474 (C.A. 5). However, those Acts present different problems. In the *Virginian* case, this Court referred to the "danger that the absence of eligible voters may be due less to their indifference than to coercion by the employer." 300 U.S. at 560. The

Labor Board has also been concerned with the possibility that employees might stay away from the polls because of employer intimidation (*R.C.A. Manufacturing Company,* 2 N.L.R.B. 159, 176)—a problem not confronting government employees. Moreover, in the railway and industrial labor situations, the rule that a majority need only cast ballots is based on the notion that those who do not participate "are presumed to assent to the expressed will of those voting." *Virginia Ry.* v. *System Federation No. 40,* 300 U.S. 515, 560. This presumption is more dubious in the government employee situation.[2]

Moreover, in construing the Railway Labor Act and the National Labor Relations Act, the courts had to choose between the "quorum" rule and the "majority of employees" rule. Here a middle course has been chosen which avoids the severity of the latter rule by recognizing the choice of a majority of voters if the total vote is substantial—*i.e.,* if it equals or exceeds 60 per cent of the eligible voters. In these circumstances, the cases under the Railway Labor Act and the National Labor Relations Act are inapposite.

---

[2] The report of the Presidential Task Force which proposed Executive Order 10988 stated that "there are many areas in the Federal Government in which civil servants have shown little or no inclination to join employee organizations or to enter into collective relationships with management officials." *A Policy for Employee-Management Cooperation in the Federal Service,* Report of the President's Task Force on Employee-Management Relations in the Federal Service, p. 7 (Gov't Printing Office, 1961).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

MORTON HOLLANDER,
ROBERT V. ZENER,
Attorneys.

NOVEMBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965